

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES KELLY ROGERS,

Defendant and Appellant.

F076917

(Super. Ct. No. F17906981)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Fresno County. Carlos A. Cabrera, Judge. (Retired judge of the Fresno County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Kendall D. Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Franson, Acting P.J., Peña, J. and Smith, J.

James Kelly Rogers (appellant) challenges a gang association probation term and seeks correction of a written protective order. We affirm the probation conditions but correct the protective order to clarify appellant may engage in peaceful contact with his minor children, as orally pronounced by the trial court.

### **BACKGROUND**

In late November 2017, the Fresno Police Department arrested appellant after he threatened to kill his girlfriend while holding two kitchen knives up to her face. According to appellant's probation report, he also threw one knife at the wall behind her and the other beside her while their two minor children sat next to her on the couch.

The Fresno County District Attorney charged appellant with a felony criminal threat (Pen. Code, § 422<sup>1</sup>) with the personal use of a deadly weapon enhancement (§ 12022, subd. (b)(1)) and two counts of felony child endangerment (§ 273a, subd. (a)). Pursuant to a negotiated disposition, appellant pled no contest to a felony criminal threat, without the deadly weapon enhancement, and one of the two counts of child endangerment reduced to a misdemeanor (§ 273, subd. (b)).

In January 2018, the trial court granted appellant three years' formal probation, conditioned on serving 365 days in jail, suspended except for 97 days of actual and good time credits. Among the standard probation terms, the trial court ordered appellant "not to be in a gang or knowingly associate with any person who is in a gang as defined in ... Section 186.22." Appellant's counsel objected, claiming this was "a general domestic violence incident" without any indication of gang activity or association. The trial court reaffirmed the gang association condition after the probation officer confirmed appellant "was involved previously in gang activities back in 1992 to 2010."

After the trial court stated it would be "signing the protective order," appellant's girlfriend asked if the order could allow for peaceful contact with her and their children;

---

<sup>1</sup> Further statutory references are to the Penal Code.

appellant's counsel joined in the request as to the children. The trial court agreed, stating: "Okay. Peaceful contact with the children at least through the first probation review. No contact with you," referring to appellant's girlfriend

### ***I. Gang Association Probation Condition***

The Legislature has granted trial courts broad discretion in establishing conditions of probation (§ 1203), which this court reviews for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality ....' " (*People v. Lent* (1975) 15 Cal.3d 481, 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin, supra*, at p. 379.) "As such, even if a condition of probation has no relationship to the crime for which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at pp. 379–380.)

Appellant asserts the gang condition is not *reasonably* related to preventing future criminality because the record lacks any facts to support he is currently a member of a criminal street gang or that he associates with any gang members, and there has been a seven-year gap since he purportedly engaged in such activity. Moreover, appellant lacks any criminal history of gang-related activity.

The trial court here expressly considered the appropriateness of the gang condition and reaffirmed it only after the probation officer stated appellant's history of gang association between 1992 and 2010. Although appellant emphasizes the length of time since any gang activity, he overlooks his even lengthier 18-year history of gang association. Given appellant's history, it was not unreasonable for the trial court to conclude appellant was well versed and entrenched in the culture of criminal street gangs,

and potentially at risk of returning to that former life. The gang association probation condition was, therefore, reasonably related to helping minimize appellant's propensity and temptation to renewing his gang association and the future criminality it could encourage.

## ***II. Protective Order***

The trial court orally pronounced the domestic violence protective order would allow for peaceful contact with appellant's children, but not with his girlfriend, yet the written protective order recorded on Judicial Council form CR-160 left box 16 unchecked, thereby indicating appellant was not permitted to have peaceful contact with any of the protected persons listed in the order. The Attorney General agrees with appellant that the trial court's oral pronouncement controls as "the rendition of judgment." (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2.) We therefore order the trial court to correct the clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

## **DISPOSITION**

The cause is remanded to the trial court to correct appellant's January 16, 2018, protective order (Judicial Council form CR-160) to reflect at box 16 that appellant may have peaceful contact only with his minor children as an exception to the " 'no-contact' " or " 'stay away' " provisions in the order.

The judgment is otherwise affirmed.